

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARIA MORALES

Claimant

V.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

CS-00-0167-901

AP-00-0448-238

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 9, 2019, Award entered by Administrative Law Judge (ALJ) Pamela Fuller. The Board heard oral argument on June 25, 2020. Scott Mann of Hutchinson, Kansas, appeared for claimant. Gregory Worth of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant sustained a 3 percent permanent partial impairment to the body as a whole as a result of her work accident. The ALJ determined claimant is not entitled to future medical treatment.

The Board considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant did not file a brief in this matter.

Respondent argues the ALJ's Award should be affirmed. Respondent argues claimant is not entitled to a work disability award because she was terminated for cause, and she failed to prove her permanent partial functional impairment is greater than 7.5 percent to the body as a whole. Respondent maintains claimant is not entitled to future medical treatment.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?
2. Is the requirement mandating the use of the *AMA Guides*, 6th Ed.¹ constitutional?

FINDINGS OF FACT

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

Claimant has worked for respondent since 2000. On January 12, 2016, claimant sustained a compensable work-related injury to her low back when she was struck by a fork lift while standing on a stool. Claimant was treated conservatively by Kent Wagner, P.A., with physical therapy and medications, though claimant testified the physical therapy was not beneficial. An MRI scan of the lumbar spine was taken on March 18, 2016, which was generally unremarkable. Claimant was also examined by Dr. Matthew Henry, who recommended conservative management.

Dr. Pedro Murati examined claimant at the request of her attorney on December 15, 2016. Claimant complained of pain in her legs, mid back, and low back. Dr. Murati reviewed claimant's medical records, including MRI studies of claimant's spine. Dr. Murati agreed he found no abnormalities on the aforementioned lumbar spine MRI. After reviewing claimant's history and performing a physical examination, Dr. Murati concluded claimant suffered low back pain with signs of radiculopathy, bilateral sacroiliac joint dysfunction, and thoracic sprain. Dr. Murati recommended restrictions and additional medical treatment. He determined the prevailing factor in the development of claimant's conditions was the work-related accident of January 12, 2016.

Claimant was terminated from respondent on July 21, 2017, for failure to report. Barbara Larsen, respondent's HR complex manager, testified regarding respondent's one-year leave policy. Claimant was originally provided FMLA leave following her last day worked, June 6, 2016. Claimant's leave was converted to non-FMLA medical leave on September 6, 2016. Claimant's return date was extended multiple times due to various doctors' orders. Ms. Larsen stated claimant was provided a letter when her leave expiration date approached, informing claimant she was expected to return to work on July 17, 2017. Claimant did not report to work at respondent from July 17-21, 2017, and was thus terminated for failure to report. Claimant has not worked since her last day at respondent. She receives Social Security Disability benefits for various non-work-related health conditions.

Dr. Vito Carabetta, a court-ordered physician, examined claimant on April 10, 2017. Claimant complained of low back pain with constant radiating symptoms into her feet. Dr. Carabetta reviewed claimant's medical records, history, and performed a physical examination. Dr. Carabetta determined claimant sustained low back pain and bilateral sciatica as a result of her work-related injury. Dr. Carabetta noted the MRI of the lumbar spine was generally unremarkable. He wrote claimant's physical examination revealed conflicting findings, stating:

Her physical examination has shown conflicting findings, and there is evidence of some symptomatic [sic]. The personal review of her MRI scan really did indeed disclose patent neural foramen on both sides and no evidence of significant disk

bulging at any level. Her lumbar examination failed to show evidence of any objectivity such as muscle spasm.²

Dr. Carabetta noted claimant is considered to be at maximum medical improvement (MMI) should she choose not to undergo recommended sacroiliac joint injections. Otherwise, Dr. Carabetta did not recommend future treatment. In assessing impairment based upon the *AMA Guides*, Dr. Carabetta, using Table 17-4, placed claimant in Class 1 level of impairment. He provided permanent restrictions and opined claimant sustained a 3 percent whole person impairment.

Claimant returned to Dr. Murati on September 28, 2017. After a review of claimant's updated history, records, and an additional physical examination, Dr. Murati's opinions remained unchanged. Included in Dr. Murati's record review were MRIs of the lumbar and thoracic spine performed on June 20, 2016. Dr. Murati opined both were unremarkable. Notwithstanding the absence of findings in the MRIs, Dr. Murati diagnosed, and used as the basis of his rating, a small herniated disc too small to be found on the MRI. Dr. Murati recommended future medical treatment and permanent restrictions.

Using the *AMA Guides*, Dr. Murati opined claimant sustained a 14 percent whole person impairment as a result of her work-related accident, 12 percent for lumbar radiculopathy, and 2 percent for the thoracic spine. In arriving at the 12 percent for the lumbar spine, Dr. Murati used Table 17-4 of the *AMA Guides* and placed claimant in a Class 2 level of impairment. When asked if Table 17-4 of the *AMA Guides* required evidence of a herniated disc, Dr. Murati stated he assumed herniated material was floating around.

Dr. Chris Fevurly examined claimant on August 1, 2018, at respondent's request. Claimant complained of constant mid to low back pain with occasional radiating symptoms into both legs. Dr. Fevurly examined claimant and reviewed her medical records and history. Dr. Fevurly stated claimant originally sustained a sprain/contusion as a result of her work accident which since resolved. He reported multiple nonphysiologic features, marked pain behaviors, and probable symptom magnification in the presence of major untreated, preexisting depressive disorder.

Dr. Fevurly determined claimant reached MMI on May 15, 2016, for any work-related contusion and sprain of her lumbar area. Using the *AMA Guides*, Dr. Fevurly used Table 17-4, low back pain with nonverifiable radicular symptoms, and placed claimant in a Class 1 modifier to determine she sustained a 3 percent whole person impairment based on nonspecific back pain without objective evidence for radiculopathy or verifiable radicular symptoms. He did not see a need for future treatment or permanent restrictions related to claimant's work incident.

² Carabetta IME at 3.

Vocational experts Steve Benjamin and Robert Barnett interviewed claimant to provide task lists and wage loss assessments. Claimant is a 53-year old woman with a high school degree from Mexico. She has no additional training or education. Claimant speaks very little English, but is capable of reading and writing in Spanish. Claimant continues to be unemployed since July 2017. Mr. Barnett testified claimant is unemployable based upon her age, chronic pain, lack of formal education and training, lack of English skills, and restrictions imposed by Drs. Murati and Carabetta. Mr. Benjamin concluded claimant could earn approximately \$364.40 per week in her labor market, for a 50.9 percent wage loss when adopting the restrictions of Dr. Carabetta. Mr. Benjamin further noted claimant would suffer no wage loss when adopting the opinions of Dr. Fevurly.

Mr. Barnett identified four unduplicated tasks claimant performed in the five years preceding the work accident. Dr. Murati reviewed the task list generated by Mr. Barnett and opined claimant could no longer perform three, for a 75 percent task loss. Dr. Carabetta also reviewed the list from Mr. Barnett and found claimant sustained a 75 percent task loss.

Mr. Benjamin generated a task list consisting of five unduplicated tasks claimant performed in the five years preceding the accident. Dr. Fevurly reviewed Mr. Benjamin's task list and found claimant suffered no task loss, as she does not require permanent restrictions. Dr. Carabetta reviewed the task list generated by Mr. Benjamin and opined claimant could no longer perform 3 tasks, for a task loss of 60 percent.

PRINCIPLES OF LAW

K.S.A. 2015 Supp. 44-510e(a) provides, in part:

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

ANALYSIS

1. What is the nature and extent of claimant's disability?

Two of the three physicians whose opinions are in evidence opined claimant suffered a 3 percent whole body impairment. Both Drs. Carabetta and Fevurly, utilizing Table 17-4 of the *AMA Guides*, believed claimant presented a Class 1 impairment, which is consistent with the lack of objective findings.

Dr. Murati rated claimant at 14 percent, 12 percent of which is related to radiculopathy. By his own testimony, Dr. Murati based his opinion upon the assumption there was herniated material floating around. There is no objective evidence in the record to support claimant has a herniated disc. The Board gives less weight to Dr. Murati's opinion related to impairment based upon speculation.

Based on the evidentiary record, the Board finds claimant suffers a 3 percent whole body functional impairment as the result of her work-related injury by accident.

To receive permanent partial general disability compensation in excess of the percentage of functional impairment, claimant has the burden of proving she suffered an impairment exceeding 7½ percent to the body as a whole or 10 percent to the body as a whole in cases where there is preexisting functional impairment. Claimant failed to meet this burden and is found not to be eligible for work disability. All other issues related to work disability are moot.

2. Is the requirement mandating the use of the *AMA Guides*, 6th Ed. constitutional?

The Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. The Board does not have jurisdiction and authority to determine a statute is unconstitutional.³

CONCLUSION

³ *Jones v. Tyson Fresh Meats, Inc.*, No. 1,030,753, 2008 WL 651673 (Kan. WCAB Feb. 27, 2008).

Claimant suffers a 3 percent whole body impairment as the result of her work-related injury by accident and is not entitled to a work disability. The Board lacks jurisdiction to rule on the constitutional issues raised by claimant.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela Fuller dated December 9, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott Mann, Attorney for Claimant
Gregory Worth, Attorney for Respondent and its Insurance Carrier
Hon. Pamela Fuller, Administrative Law Judge